

Draft Minutes
Forensic Science Board Meeting
August 12, 2009

Department of Forensic Science Central Laboratory, Classroom 1

Board Members Present

Steven Benjamin
Leah Bush, M.D.
Dale Carpenter, Ph.D.
Leonard Cooke
Colonel W. Steven Flaherty
Katya Herndon (Designee for Karl Hade)
Kristen Howard (Designee for Senator Howell and Senator Stolle)
Delegate William R. Janis (Designee for Delegate Albo)
Robert Jensen
Alan Katz
Sheriff A.A. Lipa Jr.
Senator Henry L. Marsh II
Raymond F. Morrogh
Elizabeth Russell

Board Member Absent

Jo Ann Given

Legal Counsel for the Forensic Science Board

Frank Ferguson

Staff Members Present

Wanda Adkins, Office Manager
Henry Bosman, Senior Accountant
Jeffrey Ban, Central Laboratory Director
Dave Barron Ph.D., Director of Technical Services
Donna Carter, Finance Manager
Guinevere Cassidy, Legal Assistant
Leslie Ellis, Human Resources Director
Gail Jaspen, Chief Deputy Director
Bradford Jenkins, Biology Program Manager
Alka Lohmann, Training and Calibration Program Manager
Marsha Sinclair-Kelly, Procurement and Support Services Manager
Elizabeth Mirza, Grants Administration/Policy Analyst
Kevin Patrick, Western Laboratory Director
Steven Sigel, Deputy Director
Lisa Schiermeier-Wood, Section Supervisor, Forensic Biology
Susan Uremovich, Eastern Laboratory Director
Amy Wong, Northern Laboratory Director

47 **Call to Order by Vice Chair Col. Flaherty**

48 Col. Flaherty called the meeting to order at 9:07 a.m.
49

50 **Adoption of Agenda**

51 Col. Flaherty asked if there were any additions or changes to the draft agenda. There were none.
52 The agenda was adopted as written with no revisions.
53

54 **Introduction of New Members**

55 Col. Flaherty welcomed to the Forensic Science Board ("Board") new members Delegate
56 William Janis, Sheriff A.A. Lippa, Senator Henry Marsh and Raymond Morrogh and reappointed
57 member Steven Benjamin.
58

59 Col. Flaherty then proposed that Agenda Item IV, Election of Chair and Vice Chair, be delayed
60 until all members of the Board who confirmed that they would be in attendance arrive. The
61 Board agreed to postpone the election of Chair and Vice Chair until all members were present.
62

63 **Adoption of Minutes of May 13, 2009 Meeting**

64 Col. Flaherty asked if there were any additions or changes to the draft minutes from the May 13,
65 2009 Board meeting. Mr. Benjamin asked that a transcription of the tape-recorded proceedings
66 be produced reflecting lines 337 through 350 of the draft minutes and that it be added as an
67 addendum. Mr. Benjamin moved that the minutes with the addition of the requested
68 transcription addendum from the May 13, 2009 Board be adopted. Ms. Howard seconded the
69 motion, which passed by unanimous vote of the Board.
70

71 **Adoption of Minutes of July 9, 2009 DNA Notification Subcommittee Meeting**

72 Col. Flaherty asked Ms. Howard, Chair of the DNA Notification Subcommittee, to preside over
73 the approval of draft minutes of July 9, 2009 DNA Notification Subcommittee meeting. Col.
74 Flaherty moved that the draft minutes of the July 9, 2009 DNA Notification Subcommittee
75 meeting be adopted. Ms. Howard seconded the motion which was adopted by unanimous vote of
76 the DNA Notification Subcommittee.
77

78 **Director's Report**

79 Department of Forensic Science ("DFS") Deputy Director Steve Sigel informed the Board that
80 Director Pete Marone was called out of town due to a death in the family and that he would be
81 giving the Director's report in Mr. Marone's absence.
82

83 On behalf of Director Marone and DFS, Mr. Sigel thanked the retired members of the Board for
84 their service to DFS and the Commonwealth of Virginia and welcomed the new and reappointed
85 members to the Board.
86

87 **State of the Agency**

88 Regarding facilities, Mr. Sigel informed the Board that the Northern Lab moved into its new
89 facility in May and had a grand opening in June. The new facility meets the current and growth
90 needs of that region of the state. Mr. Sigel also informed the Committee that the bid for
91 renovation of the Eastern Lab building has been granted.
92

Regarding funding/resources, Mr. Sigel informed the Board that this area remains the same as at the last meeting, with some additional comment regarding budget this area later in the Director's report.

Regarding workload/backlog, Mr. Sigel informed the Board that the Controlled Substances section's backlog has been reduced by one-third. The Toxicology pending workload numbers are up due to staff turnover.

Discussion by the Board ensued.

Regarding grants, Mr. Sigel informed the Board that of the list of seven grants approved by the Board for application and acceptance of award, one of the grants has been awarded. DFS has been awarded the Highway Safety Program DMV Grant. There were no new grants requiring the Board's consideration and approval.

Melendez-Diaz v. Massachusetts – The Decision and its Implications

Mr. Sigel introduced DFS Department Counsel, Stephanie Merritt who presented a report on the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*. Ms. Merritt informed the Board that Melendez-Diaz was convicted of the distribution and trafficking of cocaine. At trial, the prosecution relied on Certificates of Analysis to prove the nature and weight of the controlled substance. Melendez-Diaz objected to the prosecution's use of the certificates instead of the forensic scientist's actual testimony at trial. The Supreme Court ruled that a Certificate of Analysis issued by the state laboratory could not stand alone as evidence of the nature and weight of a controlled substance. Issues that were not clearly decided in *Melendez-Diaz* were: admissibility of chain of custody and calibration or quality control records and identifying/defining "analyst." The *Melendez-Diaz* decision discussed "notice and demand" statutes, citing Georgia's, Ohio's and Texas's statutes as examples of good law. Four days after the Supreme Court issued *Melendez-Diaz*, cert was granted for *Briscoe v. Virginia*. The issue in *Briscoe* is the constitutionality of Virginia's current "notice and demand" statutes, Virginia Code 18.2-187 and 187.1. As a result of the impact of *Melendez-Diaz* on many departments and agencies in Virginia, the Governor has called a special session of the General Assembly for August 19, 2009.

Chief Deputy Director Gail Jaspen informed the Board regarding the impact of *Melendez-Diaz* on DFS. There has been an increase of triple the amount of witness subpoenas received for examiners to appear and testify as a result of *Melendez-Diaz*. The week beginning June 6, 2009 DFS received 230 witness subpoenas in contrast to the week beginning July 6, 2009, DFS received 602 witness subpoenas. In June 2009 DFS staff spent 465 hours out of the laboratory in Court. In July 2009 staff spent 844 hours in court. The increase has been experienced mainly in the Toxicology, Controlled Substances and Breath Alcohol sections. For example, in June 2009 staff in Controlled Substances spent 19 hours in court while in July 2009 staff spent 369 hours in court. It is thought that if the hours spent out of the lab continue at the same level, backlogs may grow over time. DFS is looking at different avenues to help alleviate the impact of *Melendez-Diaz*, such as additional training to expand examiner competencies to test and to testify in court; changing the procedures for testing in DUI and DUID cases; limiting testing of drug schedules;

138 assigning examiners to work on cases in specific jurisdictions; and working with prosecutors
139 regarding multiple/conflicting court dates.

140
141 Special Session of the General Assembly

142 Ms. Jaspen informed the Board that DFS has participated in working group meetings examining
143 the impact of *Melendez-Diaz* on the Commonwealth. As a result, there is legislation drafted for
144 consideration at special session of the General Assembly for August 19, 2009. The legislation is
145 focused on “notice and demand” and “speedy trial” issues.

146
147 Dr. Bush brought to the Board’s attention the impact of *Melendez-Diaz* not only on
148 governmental entities but on the citizens of the Commonwealth. For example, a delay in issuing
149 death certificates in poly-pharmacy cases may impact how quickly the decedent’s family can
150 access insurance benefits.

151
152 Discussion by the Board ensued regarding the need for additional Forensic Toxicologists at DFS,
153 recruiting Forensic Toxicologists and outsourcing certain cases to subcontracting laboratories.

154
155 Mr. Jensen requested that at the October meeting of Board DFS present a report regarding
156 staffing numbers, case management and the feasibility of outsourcing to outside labs.

157
158 Budget Planning – FY 2010 and Beyond

159 Mr. Sigel informed the Board that DFS is facing both budget cuts and the *Melendez-Diaz* impact
160 regarding its budget. DFS has submitted its FY 2010 budget plan to the Department of Planning
161 and Budget (“DPB”) with five, ten and fifteen percent budget reduction plans. The FY 2010
162 budget is pending. DFS anticipates receiving guidance shortly from DPB for biennium
163 appropriation requests.

164
165 Election of Chair and Vice Chair

166 Col. Flaherty asked if there were nominations for Chair of the Board. Mr. Benjamin moved to
167 nominated Mr. Jensen for Chair and Senator Marsh seconded the motion. Dr. Carpenter
168 nominated Mr. Morrogh for Chair and Ms. Russell seconded the motion. Discussion by the
169 Board ensued. Mr. Jensen and Mr. Morrogh each made a brief statement regarding their
170 qualification and desire to be Chair of the Board. Mr. Morrogh was elected Chair by majority
171 vote of the Board.

172
173 Col. Flaherty asked if there were nominations for Vice Chair of the Board. Mr. Benjamin
174 nominated Mr. Jensen for Vice Chair and Dr. Bush seconded the motion. Mr. Jensen was elected
175 Vice Chair my unanimous vote of the Board.

176
177 Scientific Advisory Committee Chair’s Report

178 Dr. Carpenter informed the Board that the Biology Subcommittee of the Scientific Advisory
179 Committee met on Monday, August 10, 2009 and reviewed the capillary electrophoresis (“CE”)
180 protocol. The Scientific Advisory Committee (“SAC”) recommends that the Board adopt the CE
181 protocols for the Powerplex 16 for both casework and database use.

Mr. Benjamin moved that the Board adopt the CE protocols for the Powerplex 16 for both casework and database use, which was seconded by Col. Flaherty and adopted by unanimous vote of the Board.

Dr. Carpenter informed the Board that, in light of the National Academy of Science's recent report regarding review of protocols, the SAC proposes that Chairman Carpenter work with Director Marone in preparing a work plan for the systematic review of all DFS protocols by the SAC.

Mr. Benjamin moved that DFS at the October meeting of the Board present a plan for the systematic review of all protocols by the SAC. Mr. Jensen seconded the motion.

Discussion by the Board ensued.

Mr. Benjamin withdrew his previous motion and moved that the DFS and Dr. Carpenter present a plan to the Board at the October meeting for the systematic review of all protocols by the SAC, which was seconded by Mr. Morrogh and approved by unanimous vote.

Old Business

Update on New DNA Platform

Brad Jenkins, DFS Biology Program Manager, gave the Board an update report on the DNA platform change. Mr. Jenkins stated that DFS has been working on the transition to the new platform for several years. DFS has purchased the 3130xl instruments and they are installed at the labs. The CE protocols were just approved by the Board upon recommendation by the SAC. Regarding training, supervisors were sent in January and February to Marshall University for its week long CE training course which offers lectures on capillary electrophoresis and hands on training with the 3130xl instrument. This week there is a group of examiners at Marshall University for training. Another group will go the first week of September and the last group will go the last week of October. Moving forward there will be trained people in each lab that will do in-house training of examiners. Currently, there are over 100 training samples, some liquid samples and some data samples. Each examiner will be required to complete an oral exam and an examination of a mock case. Throughout the transition, both platforms will remain in the protocol books. The DNA Databank is slated to be online with the new platform in September with the other labs on line beginning in October with the Western Lab.

Discussion by the Board and Mr. Jenkins ensued.

Post Conviction DNA Notification and Testing – Notification Project Update

Ms. Jaspen informed the Board that the notification numbers remained essentially the same due to DFS's focus shifting to testing and the notification process being reassigned to the Notification Subcommittee.

Post Conviction DNA Notification and Testing – Report of Notification Subcommittee

Ms. Howard, Chair of the Notification Subcommittee informed the Board that the Subcommittee met on July 9, 2009. The requirements of Budget Item 408(B) (2008), Senate Bill 1392 (2009) and the work plan approved by the Board on May 13, 2009 were reviewed and discussed.

229 Reports were given regarding the requirements of the work plan. DFS has provided a database of
230 the all cases and individuals in Post Conviction DNA Project (“PC-DNA”) to the Subcommittee.
231 The Office of the Attorney General has prepared the necessary waiver and confidentiality forms
232 for the volunteers and pro bono attorneys. The Virginia State Bar (“State Bar”) has approved the
233 draft training program and a successful pilot training session was conducted on August 1, 2009.
234 The pilot group consisted of attorneys from the Richmond area. The training is currently under
235 consideration by the State Bar as continuing legal education credit for the pro bono attorneys.
236 The next training session will be held in September. Troutman Sanders will be sponsoring this
237 Northern Virginia training session. Ms. Howard and the Mid-Atlantic Innocence Project
238 (“MAIP”) have developed many methods to publicize and advertise the training such as listserv
239 and website announcements, press releases, flyers and advertisements in periodicals. Mr.
240 Benjamin has been designated the pro bono point of contact and will utilize the services of the
241 MAIP to help recruit and manage assignments to pro bono attorneys and to serve as a conduit to
242 disseminate and collect information from volunteers. Currently, the pro bono attorneys are
243 required to make weekly progress reports. The Virginia State Crime Commission will maintain
244 all pro bono attorney information in a database.

245
246 Discussion by the Board ensued. Ms. Howard noted that some of the female attorneys in the pilot
247 training program expressed safety concerns regarding making in-person notification to a
248 convicted suspect located in less safe area. Ms. Howard informed the Board that in the training
249 the buddy-system is emphasized and that security personnel and former law enforcement
250 individuals have volunteered to escort attorneys in to less safe areas to attempt to make
251 notification.

252
253 Post Conviction DNA Notification and Testing – Testing Project Update (Non-NIJ Eligible Cases)
254 Ms. Jaspen informed the Board that to date the total number of case files found with evidence
255 suitable for DNA testing is 3,054, of which 2,209 cases contain a named suspect and 800 cases
256 contain a named suspect known to have been convicted in the case. 806 cases have been sent to
257 the contracting laboratory for DNA testing of which 724 are felony convictions. Of the 724
258 cases, 614 cases meet the NIJ grant criteria (homicide, rape and non-negligent manslaughter);
259 105 cases meet the State criteria (other violent crimes against a person; and in 5 cases, NIJ
260 conviction confirmation is pending. Preliminary case results have returned in 373 cases. The
261 final completed case results were returned in 224 cases and 399 cases wait contactor testing.
262 Certificates of Analysis have been completed and mailed in 134 cases. The following are the
263 case test results regarding listed suspects meeting NIJ criteria: 18 convicted suspects were not
264 indicated/eliminated; 45 convicted suspects were not eliminated; known samples are needed for
265 12 convicted suspects; and there are 56 convicted suspects whose cases have insufficient
266 scientific data upon which to draw a conclusion. The following are the case test results
267 regarding listed suspects who don’t meet NIJ criteria: 13 convicted suspects were not
268 indicated/eliminated; 4 convicted suspects were not eliminated; known samples are needed for
269 32 convicted suspects; and there are 15 convicted suspects whose cases have insufficient
270 scientific data upon which to draw a conclusion.

271
272 Discussion by the Board, Ms. Jaspen and members of the Forensic Biology section of the Central
273 Lab ensued. Mr. Benjamin requested that DFS present to the Board at the October 2009 meeting
274 a report of the break down of PC-DNA numbers reported to NIJ and how those numbers

compare/contract to the numbers reported to the Board. Mr. Benjamin also requested that DFS present to the Board at the October 2009 meeting a detailed report on the test results of the 13 listed suspects who don't meet the NIJ criteria whose test results categorized them as not indicated/eliminated.

Further discussion by the Board ensued. Mr. Benjamin expressed his concern regarding the testing of cases with NIJ grant money in which there is state money earmarked for that purpose. Mr. Benjamin requested that DFS present to the Board at the October 2009 meeting a report detailing the use of NIJ testing money and state testing money regarding PC-DNA.

New Business

Preparation of Annual Report Pursuant to Va Code § 9.1-1110.B

Ms. Jaspen presented to the Board two possible options to approach the preparing of the Annual Report ("Report"). One, DFS staff would prepare a draft of the Report and circulate the draft to Board members prior to the October Board meeting, followed by a line by line review of the draft at the October meeting. Two, the Board would form a subcommittee of two Board members to work with DFS staff to draft the report followed by the subcommittee making a report to the Board at the October meeting.

Discussion by the Board ensued. Mr. Jensen moved that DFS staff prepare a draft of the Report and circulate the draft to Board members prior to the October Board meeting followed by a line by line review of the draft at the October meeting. The motion was seconded by Mr. Morrogh and approved by unanimous vote of the Board.

Ms. Jaspen informed the Board that DFS would prepare a draft of the Report and distribute it to the Board in the third week of September.

Public Comment

None

Next Board Meeting

The next meeting of the Board will be Wednesday, October 14, 2009 to begin at 10:00 a.m.

Adjournment

The Board meeting adjourned at 11:30 a.m.